

CONCURRING OPINION BY NAKAMURA, C.J.

I concur in this court's decision. I write separately to note that unlike Hawai'i Supreme Court precedent, which regards defects in a charge to be "jurisdictional," State v. Cummings, 101 Hawai'i 139, 142-43, 63 P.3d 1109, 1112-13 (2003),<sup>1/</sup> the United States Supreme Court has held that defects in an indictment do not deprive a court of jurisdiction, and thus untimely challenges to an indictment are subject to review under the plain error standard. United States v. Cotton, 535 U.S. 625, 630-31 (2002).

In its 2002 decision in Cotton, the United States Supreme Court explicitly overruled its century-old decision in Ex parte Bain, 121 U.S. 1 (1887), "[i]nsofar as [Bain] held that a defective indictment deprives a court of jurisdiction . . . ." Cotton, 535 U.S. at 631. The Court noted that post-Bain cases had cast doubt on Bain's "elastic concept of jurisdiction" and had "confirm[ed] that defects in an indictment do not deprive a court of its power to adjudicate a case." Id. at 630. The Court cited Justice Holmes's explanation that "a district court 'has jurisdiction of all crimes cognizable under the authority of the United States and the objection that the indictment does not charge a crime against the United States goes only to the merits of the case.'" Id. at 630-31 (ellipsis points, brackets, and citation omitted) (emphasis added). The Court also cited its prior holding in State v. Williams, 341 U.S. 58, 66 (1951), that "a ruling 'that the indictment is defective does not affect the jurisdiction of the trial court to determine the case presented by the indictment.'" Cotton, 535 U.S. at 631.

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<sup>1/</sup> In Cummings, the Hawai'i Supreme Court stated that "a defect in a complaint is not one of mere form, which is waivable, nor simply one of notice, which may be deemed harmless if a defendant was actually aware of the nature of the accusation against him or her, but, rather, is one of substantive subject matter jurisdiction, which may not be waived or dispensed with, and that is *per se* prejudicial. Cummings, 101 Hawai'i at 143, 63 P.3d at 1113 (internal quotation marks and citations omitted).

After explicitly overruling Bain and holding that a defective indictment does not deprive a court of jurisdiction, the Court applied the plain error standard of review in deciding the defendants' claim that their indictment was insufficient, which was raised for the first time on appeal.<sup>2/</sup> Other courts have applied the plain error standard of review in evaluating a defendant's claim, raised for the first time on appeal, that an indictment was defective because it failed to allege an essential element of the charged crime. United States v. Sinks, 473 F.3d 1315, 1317, 1320-21 (10th Cir. 2007); State v. Caldwell, 69 P.3d 830, 832-33 (Or. Ct. App. 2003).

In Hawai'i, "where plain error has been committed and substantial rights have been affected thereby, the error may be noticed even though it was not brought to the attention of the trial court." State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 75 (1993). To determine whether an error affected a defendant's substantial rights, we look to the record as a whole. State v. Toro, 77 Hawai'i 340, 347, 884 P.2d 403, 410 (App. 1994). Even where error occurs, we will not overturn the defendant's conviction unless prejudice to the defendant has resulted. Id.

Here, with respect to the charge against Defendant-Appellant Christian K. Johnson (Johnson) for operating a vehicle under the influence of an intoxicant (OVUII), Johnson was not prejudiced by the failure of the OVUII charge to allege that Johnson was driving his vehicle upon a public way, street, road, or highway. There was undisputed evidence that immediately before being arrested for OVUII, Johnson was observed by a Maui County police officer driving a vehicle on Kolu Street and Alua Street, public streets in Wailuki, Maui. Indeed, Johnson asserted as a *defense* at trial that because he "was pulled over on a State road" by a county police officer, the county officer

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<sup>2/</sup> In Cotton, 535 U.S. at 628-29, the defendants argued on appeal that their sentences were invalid under Apprendi because the drug quantity used to enhance their sentence had not been alleged in the indictment or submitted to the petit jury.

was "out of his jurisdiction" and could not pursue charges against Johnson. Johnson did not challenge the sufficiency of his OVUII charge in the trial court or in his opening brief on appeal.

The Hawai'i Supreme Court has not adopted the United States Supreme Court's analysis in Cotton. Accordingly, I concur in this court's decision.